

inspecting Assistant Vs. Dalmia Cement (B) Ltd.

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SooperKanoon Citation : sooperkanoon.com/64552

Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Feb-28-1991

Reported in : (1991)37ITD335(Delhi)

Judge : K Vishwanathan, Vice, J Bengra

Appellant : inspecting Assistant

Respondent : Dalmia Cement (B) Ltd.

Judgement :

1. It is convenient to dispose of the three appeals by a common order.

The main appeal is against the order of the CIT (Appeals) giving certain reliefs in the assessment for the year 1984-85. The CIT (Appeals) had later passed on order under Section 154 and this has given rise to one more appeal. The assessee has also filed a cross objection in respect of some of the points, decided by the CIT (Appeals).

2 to 31. [These paras are not reproduced here as they involve minor issues.] 32. This question is not really new, because the point had arisen for the assessment year 1982-83. The assessing authority had held that the assessee is not entitled to this deduction, whereas the CIT (Appeals) held otherwise. For this year also, he followed his own decision for the prior year. The decision of the CIT(Appeals) for the earlier year has been considered by the Tribunal by an order dated 24-9-1990. The Tribunal has upheld the CIT's finding. However, it would appear that, for a

subsequent year, the CIT(Appeals) made a personal inspection of the unit under discussion and he was satisfied that it was not a separate Industrial Unit at all. Shri Amitabh Kumar has pressed for review of the earlier decision on the basis of the findings of the CIT (Appeals). The facts as noticed in that year, are as follows.

33. In 1979, the assessee company obtained a sanction for extension of the industrial licence for an additional capacity of 70,000 tonnes of cement. The company had invested Rs. 4.16 crores in setting up a new plant for this purpose. The plant was commissioned in November 1981.

Hitherto, the assessee was following a method which is described as Slurry method. In the old method, limestone is mixed with water and made into a Slurry. Clinkers are manufactured therefrom. In the new method, there is no use of water at all this stage. Limestone and clay, after being crushed, are fed into a vertical roller mill. They are ground into a fine powder therein called raw meal. It is air-swept and collected in a precipitator. The collected material is, thereafter, extracted and transported and stored in a separate Silo. From this Silo, it is transported to another hopper, from where it is fed into a paddle conveyor. In the paddle conveyor, along with powdered raw meal coal slurry from the coal slurry mill is conveyed into a granulator, which is Conveyed into the vertical shaft kiln. Therein, the granules are converted into clinkers. This clinker is, thereafter, made into cement.

34. Compared to the old method, the process is entirely different. The raw material, i.e., limestone from quarries, is the same but till they are made into clinkers the processes are entirely different. After clinkers are produced in the new process as well as the old process, they are converted into cement in the same mill.

35. The assessee's claim is that the vertical shaft kiln is an independent industrial unit by itself and, therefore, entitled to the deduction under Section 80-I. The CIT(Appeals), who disposed of the material for a subsequent year, held that undoubtedly the assessee had introduced another process for making clinkers. But clinker was being produced both in the earlier units by a wet process as well as the new unit by a dry process. It was change in technology in the manufacture

of clinker and this change is relevant to part of the process and part of the manufacturing activity. However, it cannot be a new unit by itself. He pointed out that a new unit must be an independent unit.

According to him, there was no market for clinkers and its use only is in the final product, i.e., manufacture of cement. The CIT(Appeals) had also referred to the decision of the Supreme Court in the case of Textile Machinery Corporation Ltd. v. CIT [1977] 107 ITR 195. The Supreme Court had held that, for the reconstruction of an existing business, there must be transfer of assets to the new undertaking. The original plant producing clinkers had used the existing assets of the business which were already in existence as discussed above, both at the earlier stage as well as the final stage. From this, he concluded that there was no new undertaking, but the change of technology at an intermediary stage.

36. The CIT (Appeals) also examined the question from the angle of total investments. He agreed that if there was substantial investment in a new industry, it could be considered for the purpose of deduction.

According to him, the existing industry was producing 8 lac MT of cement per annum and if a similar industry were to be set up now, the investment required, will not be less than 100 crores. The investment now made is only Rs. 4.16 crores. Therefore, there is no substantial investment. He also pointed out that the new unit has not substantially increased the production capacity. The total capacity of the assessee during the year was 7.94 lac MT and the production relatable to the clinkers was only 84000 MT. Apart from the physical aspect of the unit, he had also considered, whether the profits attributable to the unit can be separately found out. Since this unit was only manufacturing clinkers, which were to be used as raw material in manufacture of the cement, it will be very difficult for assigning any profit to a particular process adopted by the assessee in preparation of the clinkers. He also pointed out that the plant would consist of superstructures also, like land, building, factories, premises, labour quarters, quarters for officials, roads, electric equipments etc. These are not separate for this unit.

37. We have considered the submission. We have also been provided with a description of the vertical shaft kiln plant, as it is working at the assessee's

premises along with the flow chart for the manufacture. The following points can be taken as undisputed :- (a) The main raw material, i.e., limestone is quarried from the same place and brought to the mill premises for both old and new units.

(b) After the limestone is brought to the units, they indicate separate terms for the separate processes. In the old method, limestone is mixed with water and made into a slurry. This is done by certain processes in separate mills.

(c) In the new process, water is not at all used. The limestone is crushed with clay in a vertical flour mill. These are, thereafter, conveyed into a separate Silo.

(d) The Slurry which is prepared in the old process is also transferred to a separate Silo, but these Silos are different and situated in different places.

(e) From the Silos, where it is kept, the dry meal is transferred to the vertical kiln shaft to be converted into clinker.

(f) In the old process, the slurry is fed into the cement mill which converts it into clinker.

(g) At this stage, where both processes produce clinker, these are used further in the manufacture of cement.

38. It will be noticed from the above that the process is really for the manufacture of clinkers and not for the manufacture of cement.

Although the process is for a manufacture of clinkers, we are satisfied that this could be a separate unit by itself. No doubt, a quarry from which limestone is brought is the same, but that is not very material.

Thereafter, till the clinker stage, there is no meeting point at all physically in the two processes. If the manufacture of clinkers can itself be considered as an end product, there can be no difficulty at all in deciding the issue in favour of the assessee. So the question would be, whether the mere manufacture of clinkers which are used by the assessee in the manufacture of cement, can be considered as a separate unit. Evidence has been produced to show that the clinker has a market of its own. It appears that there are cement factories, where the unit

manufacturing clinkers are situated far away from the unit manufacturing cement. For instance, Cement Corp. of India at Badarpur, Delhi. There is also material to show that the assessee had sold clinker as such separately.

39. The point would still remain, whether clinker could be considered as a marketable commodity. In order to satisfy the question that it is a separate unit manufacturing identifiable articles. In this connection, we would refer to the decision of the Supreme Court in the case of Union Carbide India Ltd. v. Union of India [1987] 165 ITR 1.

This identical question was considered there. That was a case of levy of Central Excise. The assessee, a manufacturer of flash lights, produced aluminium cans or torch bodies from aluminium slugs. These cans were in a rude and elementary form incapable of being employed at this stage as a component in flash light. The cans had sharp uneven edges and, in order to be used as a component in making flashlight cases, they had to undergo various processes such as trimming, threading and redrawing and, thereafter, they had to be reeded, beaded and anodised or painted. At the stage of crude aluminium cans, excise duty was demanded from the appellant. To avoid coercive action, the appellant filed price lists in which the price of aluminium cans was calculated at cost plus a margin of profit of 5% of the cost, though the appellant claimed that the aluminium cans had no market and could not be described as 'goods for the purpose of the Central Excise and Salt Act, 1944. As the appellant's claim did not find favour with the excise authorities, the appellant filed a writ petition for a mandamus directing the excise authorities not to levy excise duty and to refund the amount already collected on crude aluminium cans. The High Court dismissed the writ petition. On appeal to the Supreme Court: (i) on the facts, that the aluminium cans produced by the appellant could not be described as excisable goods and, therefore, did not fall within the terms of Section 3 of the Central Excises and Salt Act, 1944, read with entry 27 of the First Schedule; (ii) that the conduct of the appellant in submitting price lists could not serve as evidence of the marketability of the aluminium cans.

40. We have to consider, whether this decision of the Supreme Court would come to the aid of the department to hold that clinkers are similar to the aluminium cans, manufactured by Union Carbide (India) Ltd. so that it would be considered as an article or thing for the purpose of Section 80-I. There could be no difficulty in accepting the Supreme Court's conception of the expression "goods" as relevant in understanding the provisions of Section 80-I. The article or thing which is to be produced or manufactured by an assessee, in order to be eligible to deduction under Section 80-I should be a marketable commodity. According to the department, clinkers do not have such marketability. The assessee is disputing it and quite rightly so, because they themselves have sold clinkers as such to other cement companies. At the time of hearing, vouchers were produced to show that clinkers [1986] 28 Taxman 442. are a separate commodity marketable as such. We also enquired, whether central excise is levied on the manufacture of clinkers. We find that there is such a levy. Shri Amitabh Kumar submitted that a mere levy of excise duty itself is not conclusive. We agree. It is not conclusive. But these evidences show that clinker is not a intermediate product in the sense that it cannot be purchased and sold. Shri Amitabh Kumar further submitted that clinker has no use in the market even if it is purchased and sold. Its only use is, as a raw material for production of cement. Therefore, it continues to be an intermediate product. Factually, Shri Amitabh Kumar is correct, when he says that clinkers have no other use. However, the mere fact that a particular product has a very restricted use, would not, by itself, show that it is not a marketable item. There are very many marketable items which can be used only as raw material in the production of some other final product. Nevertheless, these intermediate products are also treated as marketable goods. For instance, rubber sheets can be used only in rubber companies for manufacture of rubber goods, like tyres etc. Rubber sheets, by itself, does not have any other use. Still it is a product known in the market.

Preparation of many basic chemicals are considered as manufacturing articles or things even though these basic chemicals are only used as raw materials in further preparation of chemicals and products.

41. We have given in para 37 the method used in the preparation of clinkers in the vertical shaft kiln. It is quite clear from the chart and the description that the

machineries, the buildings housing them, the conveyor systems and Silos are separate and different from the rest of the plant which was being used for preparation of clinker under the wet process. They might be situated near about the same place. But that is because the product of both the processes, clinker is to be used by the assessee company itself as a raw material for the production of cement. It is because of this, that they had kept both the units together at the same place. It has been pointed out that in respect of some of the cement companies, the unit preparing clinker is situated at a totally different place from the unit which grinds it into cement.

Cement Corp. of India at Badarpur, Delhi, has split its grinding unit from clinker unit. In respect of Narmada Cement Co. Ltd., the clinker unit is so far away that it has to be brought in barge in the river to the grinding unit. So the fact that their situated together, does not, in any way, disentitle the assessee to the claim.

42. The CIT (Appeals), who had disposed of the appeal for the assessment year 1985-86, had given certain other reasons. He had pointed out, that the total investment of Rs. 4.16 crores is negligible if we keep in mind that the assessee, was having a capacity of 8 lakh MT and their new unit added only a capacity of 70,000 Tonnes. He has also pointed out that at the present cost, it would require an investment of 100 crores to have a similar unit to be put up. Therefore, there was no substantial investment. The question of substantial investment in our opinion can arise only if there is no material to show that the industrial undertaking is not separate. If the existing undertaking were to be expanded and then claimed that, in view of the expansion, it has become a new unit, it would be necessary to go into this issue. The Supreme Court has observed in Textile Machinery Corporation Ltd.'s case (supra) at p. 203 as under:- The answer, in every particular case, depends upon the peculiar facts and conditions of the new industrial undertaking on account of which the assessee claims exemption under Section 15C. No hard and fast rule can be laid down. Trade and industry do not run in earmarked channels and particularly so in view of manifold scientific and technological developments. There is great scope for expansion of trade and industry. The fact that an assessee by establishment of a new industrial undertaking expands his existing business, which he certainly does, would not, on

that score, deprive him of the benefit under Section 15C. Every new creation in business is some kind of expansion and advancement. The true test is not, whether the new industrial undertaking expansion of the existing business of the assessee, but whether it is nil the same a new and identifiable undertaking separate and distinct from the existing business. No particular decision in one case can lay down an inexorable test to determine, whether a given case comes under Section 15C or not. In order that the new undertaking can be said to be not formed out of the already existing business, there must be a new emergence of a physically separate industrial unit which may exist on its own as a viable unit. An undertaking is formed out of the existing business if the physical identity with the old unit is preserved.

43. It will be seen from the above that the test is a new and identifiable undertaking separate and distinct from the existing business has come into being. In our opinion, it would not be necessary even to go into the test of substantial investment because the unit, by itself, could stand separately. He has also pointed out that the new unit shares the same superstructures like land, buildings, labour quarters, quarters for officials etc. Now, sharing of the same land, buildings, and labour quarters etc. would be inevitable if in the same business there are more than one industrial units. The CIT (Appeals) objections would show that the whole thing is one business. We are not concerned with that question. We are concerned with the issue, whether, even with one business, there is a separate industrial unit.

44. The CIT (Appeals) had also pointed out the difficulty in computing the income in respect of this unit. No doubt, there may be some difficulty because the unit is producing clinker which is used in the manufacture of cement. This difficulty will be present in every case, where a separate unit is established for manufacturing of one item in the production of the final product. But if separate "registers are maintained showing the input and the production, there should be no difficulty in ascertaining the profits and loss in respect of this unit. It is an admitted position that separate registers are available and it is possible notionally to work out the profits from this unit.

Taking into consideration all these aspects, we are satisfied that the assessee is eligible for the deduction under Section 80-I.45. In Ground No. 15, the question is, whether the assessee would also be eligible for the deduction under Section 80HH. The findings given by us in the earlier paragraphs regarding Section 80-1 is sufficient to dispose of this in favour of the assessee.

46. In Ground No. 16, the question is, whether the assessee is entitled to a deduction in respect of the liability estimated by them under a Pension Scheme. This is not a new issue. It has been considered in detail by the Tribunal while disposing of the assessee's appeal for the assessment year 1978-79. Briefly, the pension scheme was introduced for the senior employees as on 1-1-1976. The scheme lays down a formula for the computation of pension payable to the retiring employees. Pension was payable on the attaining of age of superannuation. The assessee had calculated on actuarial basis their liability for pension for each year and had debited it to the Profit and Loss A/c. When the claim came for consideration, the Tribunal found that, under Article 12 of the scheme, power was reserved for the Board of Directors to modify all or any of the provisions of the scheme and to withdraw the scheme at any time.

Therefore, the Tribunal held that there was no ascertained liability at all. The provision was only contingent one and it could not be allowed as a deduction.

47. During the accounting year concerned, the assessee has amended the provision. The amended provision now reads as follows:- The Board of Directors of the Company may, from time to time, modify any of the provisions of this scheme and/or withdraw the same at any time prospectively without in any manner whatsoever, effecting retrospectively the operation of the provisions of this scheme or the liability incurred by the Company or the benefits accrued to the eligible employees under the existing provisions of this scheme prior to the date of any such modification or withdrawal of any provisions thereof.

48. On the basis of this amendment, the assessee had claimed before the departmental authorities, the deduction towards actuarial liability to pay pension. In a letter to the ITO dated 28th August 1984, the assessee had claimed that, after the amendment of Clause (xii), there was no discretion left to the Directors and,

under the circumstances, the contributions made are allowable expenses. The contributions during this year were Rs. 2,56,450. This was claimed as admissible. A sum of Rs. 1,80,186 being the pension actually paid, was also claimed as deductible. Besides, they have also claimed deduction of Rs. 12,00,703 representing contributions right from 1976 to 1982. The ITO, however, did not accept the assessee's claim. The CIT (Appeals) was satisfied that, in view of the amendment to the scheme, the assessee was eligible for the deduction.

49. Shri Amitabh Kumar, for the department, submitted that even after the amendment, the liability continues to be contingent. He further submitted that the assessee has not divested themselves of these funds.

The moneys are very much with the assessee at their disposal. The objection of the Tribunal has not been met by the amended provision.

Relying on the decision of the Supreme Court in the case of Allahabad Bank Ltd. v. CIT [1953] 24 ITR 519 and the decision in Indian Molasses Co. (P.) Ltd. v. CIT [1959] 37 ITR 66, he submitted that the liability, if any, is purely contingent and cannot be allowed as a deduction.

50. Shri Harihar Lal, however, submitted that, on identical circumstances, the Delhi High Court, in the case of Ishwar Industries Ltd. v. CIT [1984] 149 ITR 301 has accepted that the assessee is entitled to the deduction. The Supreme Court also in the case of CIT v. Associated Electrical Industries (India) (P.) Ltd. [1986] 157 ITR 72, has held a similar view.

51. The first question to be decided is, whether the issue is already covered by the decision of the Tribunal for the assessment year 1977-78. If that is so, there would be no need for this Bench to reconsider the issue. We have carefully gone through the order of the Tribunal referred to by the Department. Two reasons have been given by the Tribunal for coming to their finding. The first is that the assessee has not divested themselves of the funds. The second was the Clause (xii) as it stood at that time. This order of the Tribunal was passed on 15th July 1983. If there has been further development in this Branch of law after the date of the order, the assessee would be entitled to review the decision in the light of the subsequent

development. It is in this connection, that we have to refer to the authorities relied upon by the assessee. The decision of the Delhi High Court in the case of Ishwar Industries Ltd. (supra) was delivered on 29-5-1984. In that case, the assessee company introduced from 1-1-1970 a gratuity scheme for its employees. The liability arising in respect of that scheme was claimed as a deduction. There was no divestment of funds, but only creation of a liability under a scheme. Nevertheless, the Delhi High Court held that the assessee is entitled to the deduction. The High Court observed that the fact that gratuity fund was to be administered by a Board of Directors, did not effect the allowability of the amount. Once the amount was credited to the gratuity fund, it was no longer capable of being used by the company for its own purposes. In the assessee's case also, a separate scheme has been created and the funds of the scheme are separately credited in the assessee's own books. Thus, on the basis of the Delhi High Court decision, there is enough divestment for the purpose of eligibility of the deduction.

52. The second point to be considered is, whether the amendment to Clause (xii) has removed the disability. We have already extracted this clause. Even under the modified scheme, the Board of Directors retain the power to withdraw the scheme. However, such withdrawal would be only prospective. It will not effect the operation of the provisions to the employees who had already become eligible. It means, therefore, that so long as the Directors have not exercised this power by the end of the accounting year, the rights accruing to the employees on the last day of the accounting year, cannot suffer in any way. Thus the rights have got crystallised and cannot be withdrawn. Therefore, there is a liability as far as the accounting year is concerned. Certain valuable rights have been given to the employees which are beyond the powers of the Board of Directors. Therefore, there is a clear liability arising to the assessee towards the payment of pension. So the CIT(Appeals) is justified in coming to his finding that the assessee is entitled to this deduction.

53. This will take us to the next question, whether the entire amount of Rs. 14,57,153 would be eligible for deduction. This consists of three items. First, the contribution of the company for the pension scheme actually valued for this year. This is Rs. 2,56,450. The second is the amount actually paid during this year, i.e.,

Rs. 1,80,186. The third is the amount which had been credited in the prior years and which was not allowed as a deduction. This is Rs. 12,00,703. Out of this, we are concerned only with the first and the third items. In view of the above discussion, there is no difficulty in arriving at the finding that the liability actuarially valued amounting to Rs. 2,50,450 is admissible as a deduction. With regard to the claim of Rs. 12,00,703, the situation is identical with the facts in the Supreme Court decision in Associated Electrical Industries (India) (P.) Ltd.'s case (supra). That was also a case, where the assessee company had drawn up a pension scheme for the employees. The claim for deduction earlier, was not allowed because the company had control over the funds. As in this case, the assessee company amended the scheme and in the year of amendment, claimed the deduction for all the earlier years.

The Supreme Court had held that, in the years in which the amendment had taken place, the assessee was entitled to the deduction of the entire amount including the earlier years liabilities. On the strength of this decision the assessee would be eligible for the deduction of Rs. 12,00,703 also.

54. The department has also made a reference to decision of the Supreme Court in the case of Shree Sajjan Mills Ltd. v. CIT [1985] 156 ITR 585.

That case has no relevance at all to the issue before us. That was a case of a claim for deduction of provision for gratuity. There is a specific bar in the statute in Section 40A(7). The Supreme Court did not accept the assessee's submissions regarding the interpretation of Section 40A(7). As far as the pension scheme is concerned, there is no such statutory provision. Thus, the decision in Shree Sajjan Mills Ltd.'s case (supra) is not at all relevant for this issue.

55. In Ground No. 17, the issue is, whether certain payments made to two retired employees by way of a commutation of pension could be considered for disallowance under Section 40A(5). As already stated, the assessee has a pension scheme, the retiring employees, under Clause (v) of the Pension Scheme, had option of commuting either the whole or a part of the pensionary benefits. Two of the employees who retired during the accounting year, exercised such a provision and was paid a commuted sum totalling Rs. 2,06,143. The assessee

company, in their initial computation of the disallowance of Section 40A(5) had included this amount in the consideration. Later on, they wrote to the assessing officer that the commuted payments cannot be included for this purpose.

The assessing authority disregarded the assessee's contention. He was of opinion that the payment was also in the nature of salary and, therefore, it has to be considered for the purpose of Section 40A(5).

On appeal, the assessee had contended that the payment of commuted pension would not be covered by Section 17(1)(ii). The words used in that case were annuity or pension, which imply periodical payments.

Lump sum payment made in commutation of pension is not a periodic payment. Reference was made to the specific exemption granted to commuted payments under Section 10(10A). The assessing authority had relied upon the decision of the Calcutta High Court in the case of Union Oxygen Ltd. v. CIT [1987] 164 ITR 466. The assessee submitted that the decision was not applicable because therein, the High Court had considered the provisions of Section 40(c) as the payment was made to a director. On that ground, the case was distinguishable. The CIT(Appeals) also agreed that the Calcutta High Court decision would not apply to the facts of the case. He further accepted that the term "salary" under Section 17(1) would not include the commuted pension payment. In view of this, he deleted the amount of Rs. 2,06,143.

56. In our opinion, the department's contention must be partially accepted. Under Section 40A(5), the department has to disallow a part of the expenditure incurred by the assessee in providing salary to the employees. The meaning of the expression "salary" would be the same as Section 17(1) and 17(3). Section 17(1) does include the expression 'pension'. However, the assessee's case is that a commuted payment does not represent pension at all. Now, for this purpose, we may refer to the provisions of Section 10(10A). Under this section, the amount receivable by an employee in commutation of pension would be exempt up to a particular limit. The implication of this section is, that, but for the provisions of Section 10(10A), such commuted pension payments would also be income. Even now, any payment of commutation of pension in excess of the limits prescribed in

Section 10(10A) would become taxable. Now, since it is a payment of excess over the admissible limit, received from the employer or ex-employees, it has the characteristics of salary or pension. The commutation allows the employer to write off their liability of periodic payment by substituting that one lumpsum payment. No right of the employee is transferred or nullified by such payment. It is not the price paid for extinguishment of the rights of the employees. Therefore, it cannot be considered as a capital payment. Its character essentially is that of payment of pension only.

57. In this connection, we may refer to the decision of the Special Bench of the Tribunal in the case of IAC v. Kodak Ltd. [1983] 3 SOT 517 (Bom.). In that case, the assessee had paid to their employee on retirement, Rs. 36,410 as retirement gratuity. This was included in the computation of in admissibles under Section 40A(5). As in this case, there was a submission that gratuity was outside the term of salary under Section 17. This submission was rejected. However, the Tribunal considered that in respect of the payment of gratuity to a former employee, there is a separate limit prescribed under Section 40A(5) and that limit has to be considered in the computation. In our opinion, the decision in this case also should be identical. An employee becomes eligible for commutation only after his retirement. Therefore, a payment made to him after retirement is a payment to a former employee.

Section 40A(5) provides for separate limits for payments to former employees, so the department should consider this as a separate payment made to a former employee and allow separate deduction of Rs. 60,000 each, i.e., Rs. 1,20,000 and consider only the balance for the purpose of disallowance under Section 40A(5). On this ground, the departmental appeal is partly allowed.

58 to 70. [These paras are not reproduced here as, they involve minor issues.] 71. In the next ground, Ground No. 21, the department questions the admissibility of a deduction of Rs. 83,81,427. The claim arose in this manner. As stated earlier, the assessee company has been allowed to quarry limestone in certain areas in Tamil Nadu. In respect of such quarrying the assessee has to pay certain royalties to the State Government. We were concerned with the royalties which were outstanding

in respect of these quarries in the earlier ground. In this ground, we are concerned with an additional cess levied by the State Government.

The royalty is payable under Section 115 of the Madras Panchayat Act 1958. The State added one cess in respect of the royalty payable. This was brought about by an amendment in 1964. As per this amendment, the assessee had to pay a local cess at the rate of 45 paise per rupee. The assessee company and other cement companies operating in Tamil Nadu, resisted the levy and filed writ petitions in the High Court of Madras.

These petitions came up for hearing before a Single Judge who dismissed the Writ Petitions holding that the cess levied under Section 115 of the Act, is a tax on land and as such fell under Entry No. 49 of the State List of Schedule VII of the Constitution and, therefore, a valid levy. In arriving at this decision, reliance was placed on the decision of the Supreme Court in the case of H.R.S. Murthy v. Collector of Chittoor AIR 1965 SC 177. He held that the cess levied under Section 115 was a tax on land, though fixed with reference to the land revenue.

From this order, the cement companies filed appeal before the Supreme Court. These assessments were completed during the time when the appeal before the Supreme Court was pending.

72. As per this levy, the assessee had to pay in respect of the accounting year Rs. 83,81,453 representing the cess on royalty. These were not paid because the High Court had stayed the collection of the cess pending the decision of the Supreme Court. The assessee had filed the return for the assessment year 1984-85 without noticing this liability towards the payment of cess. However, thereafter, they wrote a letter to the ITO stating that the liability towards cess is a statutory liability and should be allowed as a deduction. The ITO did not accept the assessee's claim. He pointed out that similar issue had arisen in the prior assessment years and the claim was not allowed. He referred to the fact that the CIT (Appeals) for the assessment year 1983-84 has allowed the deduction, but he stated that the department has filed an appeal against the deduction and that appeal was pending.

73. The matter came before the CIT (Appeals). Before the CIT (Appeals), for the first time, the case was argued under Section 43B. According to the department, the cess was a tax and since this was not paid, it should be disallowed because of the provisions of Section 43B. A reference was made to a circular of the Central Board of Direct Taxes dated 18-5-1967 in which the Board has given directions not to include cess in the expression 'tax' found in Section 40A(ii). It was further submitted that there was a clear distinction between the tax and cess and both were not equal. It was pointed out that Section 43B uses the term tax and duty, although duty is also a species of tax. So the expression "tax" is used in a narrow sense and would not cover "cess".

The CIT (Appeals) was impressed by the fact that the Board itself has accepted that the tax would not include cess for the purpose of Section 40A(ii). When such Section 43B mentioned 'tax' and 'duty' , but not "cess", it is clear that cess could not be equated with tax. He, therefore, held that the assessee was entitled to this deduction.

74. Against this finding, department has come in appeal. The main reliance of the department is on the decision of the Madras High Court in the case of the assessee following case of I.I.R.S. Murthy (supra).

The Supreme Court had accepted the contention of the State Government that the royalty and the cess there on could be considered as a tax on land. The assessee's own Writ Petitions have been dismissed as early as 1967 on this very ground. Therefore, according to the Department, during the accounting year concerned, the levy was a tax. If it was a tax, it would be necessary for the assessee to make payment in order to be eligible for the deduction in view of Section 43B. The finding that it is tax is enough and it is not necessary that there will be a further finding, whether the term is used in the narrow sense or in the broader sense.

75. Before we consider these objections, it is necessary to state what happened to the appeals pending in the Supreme Court. After the CIT (Appeals) had disposed of this matter in September 1987, the writ appeals were heard by the Supreme Court and disposed of on 25th October, 1989. That was a constitutional Bench

consisting of seven judges. Six judges accepted the assessee's appeal and held that the levy was not valid as a tax. Justice Oza wrote a separate order, where he held that the imposition would come within the purview of Entry No.49 of the List II of the Constitution. The majority opinion was given by his Lordship Justice Sabya Sachi Mukherjee. The majority opinion had clear held that cess on royalty cannot be sustained under Entry 49 of List II as being a tax on land. "Royalty on mineral rights is not a tax on land, but a payment for the user of land". The Supreme Court has also considered the submission that the decision of the apex court in the case of H.R.S. Munhy (supra) had been prevailing in this country as the rule of the land for several years and many welfare programmes have been undertaken on that basis. On the finding of the Supreme Court, that royalty and cess were not tax, all the amounts collected would become illegal and will have to be refunded. This would create considerable problems for the States and Panchayats. The Supreme Court saw good deal of substance in the submission. They observed : "We are, therefore, of the opinion that we will be justified in declaring the levy of the said cess to be ultra vires, the powers of the State Legislature prospectively only".

76. Relying on this Supreme Court decision, the assessee had argued that cess was not a tax at all and, therefore, it would not come for consideration under Section 43B. In our opinion, the matter is not so simple. If the Supreme Court had held that cess was not a tax at all for all purposes and for all times, there would be no problem. The assessee's contention could be accepted. However, the Supreme Court has not done so. According to them, it is a valid levy till the date of their pronouncement of their judgment, i.e., till 25th October 1989 it is a valid levy. Thereafter, it becomes invalid because of the prospective invalidation. So if it was valid, we must consider, whether it could still be treated as a tax. We may at this stage consider an argument that the validity till the date of the judgment was only a direction given for the States to hold on to the amounts collected and not to refund them. We do not think we would be justified in considering the validity of the levy in this narrow prospective. If it was valid for the purpose of not allowing a refund, it is valid for all other purposes also till the date of the Supreme Court's order. If the payment has not been made, certainly the State Government can use its coercive machinery for recovering the amount. During this period, therefore, it has to be treated only as a tax since its validity rested on such finding given in the

earlier order in H.R.S. Murthy's case (supra).

77. This will now take us to the further issue. The Supreme Court in H.R.S. Murthy's case (supra) was concerned with the question, whether the levy was tax from the constitutional point of view, i.e., one should see it from a broad angle. Further in considering the vires of levy, there is always a presumption that a levy is constitutionally valid unless otherwise proved. Three arguments were raised against the validity in that case. They were (i) the expression "royalty" under Section 79(1) did not signify royalty as commonly understood but was confined to the rent payable for the beneficial use of the service of land. This submission was rejected. The second submission was that even if the royalty is a tax for the purpose of constitution, the cess must be held to be repealed when the Mining and Minerals Regulations Act, 1948 was repealed, so that after the date when the Central enactment came into force, the land cess that could be levied, must be exclusive of royalty under the mining lease. This submission was also rejected on the ground that there was no connection between the regulation and development of mines and minerals dealt with in the Central Act and the levy and collection under the State Act. There was no scope at all for the argument that there was anything common between the Centre and the State Act as to require a detailed examination for discovering whether they were overlapped. The third argument was that it could not be recovered as an arrear of land revenue. This was also rejected. So the only inference from this decision is that the Supreme Court has upheld the validity with reference to the Constitution, 78. We accept Shri Hari Har Lal's submission that the expression 'tax' as used in the constitution, is in a wider sense and the same expression could be used in a narrower sense also. For instance, Article 265 of the Constitution says "no tax shall be levied or collected except by an authority of law". Here the expression 'tax' is used in a broad sense. However, Article 277 uses the same word in a narrow sense. That Article reads as follows:- 277. Any taxes, duties, cesses or fees, which, immediately before the commencement of this Constitution, were being lawfully levied by the Govt. of any State or by any municipality or other local authority or body for the purposes of the State, Municipality, district or other local area may, notwithstanding that those taxes, duties cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by

Parliament by law.

79. So the question still remains, in what sense the expression 'tax' had been used in Section 43B. It will be seen from Article 277 that other species of taxes are duties, cess or fees. Now in Section 43B, as it was originally enacted, the expression 'taxes and duties' alone were included, cesses or fees were not part of the section. Nevertheless, the department had been attempting to include market cess as a prohibited item under Section 43B. The Supreme Court in the case of *Om Parkash Agarwal v. Giri Raj Kishori* [1987] 164 ITR 376 had brought out a distinction between 'tax' and 'fees'. Whereas tax is an imposition for public purposes without reference to Special benefit to taxpayer, the essential character of fee is that it should be co-related to expenses incurred by the Govt. in rendering services. This distinction between the taxes and fees were made use of by the Andhra Pradesh High Court in the case of *Srikakollu Subba Rao & Co. v. Union of India* [1988] 173 ITR 708 to hold that a market cess is not in the nature of either tax or duty. Thus, we have authority to hold that even if a cess would be tax in the larger sense, it is not tax in the narrower sense and it would not come under Section 43B.80. The Legislature had realised this and they had amended the ambit of Section 43B by the Finance Act, 1988, w.e.f. 1-4-1989. The section, as now amended, includes tax, duty, cess or fee. They have not made this amendment retrospective. Therefore, we cannot ignore the obvious distinction between the tax in the narrower sense and cess and fees and hold that the levy of cess would come under Section 43B. We will, therefore, agree with the assessee's counsel, Shri Hari Har Lal and hold that the levy, although a tax for the purpose of constitution for this accounting year, is not a tax within the meaning of Section 43B. The order of the CIT (Appeals) is reasonable.

81 to 114. [These paras are not reproduced here as they involve minor issues.]

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